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11

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 CENTER FOR BIOLOGICAL
16 DIVERSITY;

17 Plaintiff,
18 vs.

NATIONAL OCEANIC ATMOSPHERIC
19 ADMINISTRATION;

Defendant.

Civil Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**
**(Freedom of Information Act, 5 U.S.C.
§ 552)**

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to the Freedom of
2 Information Act (“FOIA”), 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331 (federal
3 question jurisdiction).

2. Venue is properly vested in this Court pursuant to 28 U.S.C.
3 § 1391(e), because a substantial part of the events and omissions giving rise to the
4 claim occurred in this District and because a substantial number of the records are
5 likely located in this District.

3. Jurisdiction and venue are also proper under 5 U.S.C. § 552(a)(4)(B)
because a substantial number of the records are likely located in this District.

1 INTRODUCTION

2 4. In this action, Plaintiff Center For Biological Diversity (“Center”)—
3 an environmental conservation organization that works to protect native wildlife
4 species and their habitats—challenges the failure of the National Oceanic and
5 Atmospheric Administration (“NOAA”) to comply with FOIA in order to compel
6 NOAA to disclose records that have been unlawfully withheld after a FOIA
7 request.

8 5. FOIA requires that federal agencies respond to public requests for
9 records in order to increase public understanding of the workings of government
10 and provide access to agency records. The records that the Center seeks concern
11 NOAA’s decision to deny the Center’s petition to list the Pacific bluefin tuna as
12 threatened or endangered under the Endangered Species Act (“ESA”), 16 U.S.C.
13 § 1531 *et seq.*, and to designate critical habitat concurrently with its listing.

14 6. Pacific bluefin tuna are at a population level of less than 4 percent
15 than the estimated population before fishing. Because Pacific bluefin tuna ranges
16 from north of Japan to New Zealand in the western Pacific, and off California and
17 Mexico in the eastern Pacific, it is highly vulnerable to excessive fishing by
18 various nations. The information sought is of public interest because it relates to
19 the federal management of the nation’s most imperiled wildlife and the
20 implementation of the Endangered Species Act.

21 7. On December 18, 2017, the Center submitted a FOIA request to
22 NOAA for all records generated in connection with the denial of the Pacific bluefin
23 tuna listing petition. On April 10, 2018, NOAA sent its first interim response to
24 the Center’s FOIA request. On June 18, 2018, NOAA sent its second and final
25 response, while partially or fully withholding 257 records under FOIA Exemptions
26 4, 5, 6, or 7.

27 8. On September 11, 2018, the Center filed an appeal of NOAA’s FOIA
28 response. The Center’s appeal asserted that NOAA has conducted an inadequate

1 search for records and challenged the agency's exemption 5 withholdings.

2 9. FOIA requires agencies to make a determination on any
3 administrative appeal within 20-working days after the agency receives the
4 appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

5 10. NOAA has violated FOIA's statutory deadline for making a decision
6 on the Center's appeal.

7 11. The Center seeks an order declaring NOAA in violation of FOIA,
8 requiring NOAA to make a lawful determination on the Center's administrative
9 appeal, and directing NOAA to conduct an adequate search for records and to
10 release all records and portions of records that were improperly withheld pursuant
11 to Exemption 5.

PARTIES

12 12. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center")
13 is a national, nonprofit conservation organization that works through science, law,
14 and policy to secure a future for all species, great or small, hovering on the brink of
15 extinction. The Center is dedicated to the preservation, protection, and restoration
16 of biodiversity and ecosystems throughout the world. The Center has more than
17 69,500 members.

18 13. The Center informs, educates, and counsels the public regarding
19 environmental issues, policies, and laws relating to environmental issues.
20 Specifically, the Center works to provide its members and the public with a better
21 understanding of the government's management of protected species of wildlife,
22 and in particular, its implementation of the Endangered Species Act. The Center
23 has been substantially involved in the management activities of numerous
24 government agencies for decades and has consistently displayed its ability to
25 disseminate information granted to it through FOIA. Informing the public is
26 central to the Center's mission. The Center educates and informs the public
27 through media advocacy, its webpage, and other widely distributed publications.

1 14. The Center and its members are harmed by NOAA's violations of
2 FOIA. Such violations preclude the Center from gaining a full understanding of
3 the management of Pacific bluefin tuna and NOAA's implementation of the
4 Endangered Species Act, or disseminating that information to the public. These
5 injuries would be redressed by a favorable decision granting the Center its
6 requested relief.

7 15. Defendant NATIONAL OCEANIC AND ATMOSPHERIC
8 ADMINISTRATION is an agency within the Department of Commerce. NOAA is
9 the agency to which the Secretary of Commerce has delegated the authority to
10 implement the Endangered Species Act for most threatened and endangered marine
11 species, and is in possession and control of the records that the Center seeks, and as
12 such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

14 16. FOIA's basic purpose is government transparency. It establishes the
15 public's right to access all federal agency records unless such records may be
16 withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C.
17 § 552(b)(1)-(9). Any inquiry under FOIA brings with it a strong presumption in
18 favor of disclosure.

19 17. FOIA imposes strict deadlines on federal agencies when they receive
20 a request for records pursuant to FOIA. Specifically, an agency must determine
21 whether to disclose responsive records and notify the requester of its determination
22 within 20-working days of receiving a FOIA request, and it must make records
23 "promptly" available, unless it can establish that certain unusual circumstances are
24 present and/or that it may lawfully withhold records, or portions thereof, from
25 disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20-working days, the agency
26 must inform the requester that it has a right to appeal the agency's determination.
27 *Id.* § 552(a)(6)(A)(i). If an administrative appeal is filed, the agency has 20-
28 working days to respond to that appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

18. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

19. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

20. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA's broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA's dominant objective of disclosure, not secrecy.

21. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

22. FOIA permits the Court to assess “reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i).

FACTUAL BACKGROUND

A. The Imperiled Pacific Bluefin Tuna and Petition to List Under the Endangered Species Act

23. The Pacific bluefin tuna (*Thunnus orientalis*), one of three bluefin tuna species, are slow-growing, long-lived, endothermic fish. Pacific bluefin are renowned for their large size, unique physiology and biomechanics, and capacity to swim great distances. The species migrates tens of thousands of miles across the largest ocean to feed and spawn, ranging from waters north of Japan to New Zealand in the western Pacific, and off California and Mexico in the eastern Pacific.

24. Commercial fishing is the primary threat to the survival of the Pacific bluefin tuna. Since the start of heavy fishing, around the early 1930s, Pacific

1 bluefin tuna have suffered a more than 96% population decline. Despite severe
2 overfishing for decades, commercial catch in the eastern Pacific was not limited by
3 international agreement until 2012, and in the western Pacific until 2013. Recent
4 catch remains significantly higher than the catch limits based on scientific advice.

5 25. Pacific bluefin tuna are also threatened by water and plastic pollution,
6 oil and gas development, renewable energy projects, large-scale aquaculture,
7 forage fish depletion, and climate change.

8 26. In an effort to address these threats, on June 20, 2016, the Center
9 (along with individual scientists and other organizations) petitioned NOAA to list
10 the Pacific bluefin tuna as a threatened or endangered species under the
11 Endangered Species Act.

12 27. On October 11, 2016, NOAA published a “positive 90-day finding”
13 pursuant to the ESA, finding that the petition presented substantial scientific or
14 commercial information indicating that the listing of the Pacific bluefin tuna may
15 be warranted, and announcing the initiation of a status review of the species. 81
16 Fed. Reg. 70,074.

17 28. Subsequently, on August 8, 2017, NOAA issued a “negative 12-
18 month finding” pursuant to the ESA, concluding that listing of the Pacific bluefin
19 tuna is not warranted and that the species “faces an overall low risk of extinction.”
20 82 Fed. Reg. at 37,079.

21 **B. The Center’s FOIA Request to NOAA**

22 29. On December 18, 2017, the Center submitted a FOIA request to
23 NOAA seeking all records generated in connection with the denial of the Pacific
24 bluefin tuna listing petition under the Endangered Species Act.

25 30. On January 12, 2018, NOAA sent the Center a letter acknowledging
26 the FOIA request and invoking a 10-workday extension “[d]ue to the need to
27 search for and collect the requested records from field facilities or other
28 establishments separate from the office processing the request.”

1 31. On February 2, 2018, NOAA sent the Center electronic mail seeking
2 clarification of its request. In that email, NOAA stated that the Center's request
3 lacked a date range and thus, the agency considered "the date range for responsive
4 records from the date of the petition (June 20, 2016) to the date of the agency final
5 decision (August 8, 2017)." NOAA added that "[i]f that is not correct we will need
6 further clarification," and that it needed clarification on what is considered a
7 "responsive document."

8 32. On February 9, 2018, the Center sent NOAA electronic mail
9 confirming that its request sought all records comprising "the decision file for the
10 decision to not list Pacific bluefin tuna" including "correspondence related to the
11 denial of the petition," but not "the rollout plan." The Center further stated that it
12 did not seek background records "associated with the report [that] came after the
13 decision not to list Pacific bluefin tuna" (e.g., a summary fact sheet).

14 33. On February 23, 2018, NOAA and the Center participated in a
15 telephone call. On February 28, 2018, NOAA sent the Center a letter
16 memorializing that telephone conversation. That letter stated:

17 In that conversation, I provided you with a status update of our
18 response and requested an extension of the FOIA time limits.
19 We have tasked your request to the West Coast Region's
20 Protected Resources Division and Sustainable Fisheries
21 Divisions, the NOAA Office of Protected Resources (O/PR)
22 and the Southwest Fisheries Science Center to search for
23 responsive records. At this time, we are in the process of
24 collection and review of records submitted by the responding
25 offices. At the time of our conversation last Friday there were
26 over 1,000 separate record items, but this number has since
grown as additional records have been collected. Due to the
volume and complexity of the responsive material and our
limited resources, we will need additional time to complete our
processing of your request. Thank you for the Center's
willingness to receive records on a rolling basis (as indicated on
your request letter). We anticipate providing you with an
interim release on or about March 20, 2018. We hope to
complete our final response to you by September 20, 2018.

1 34. On March 12, 2018, the Center sent NOAA electronic mail stating
2 that it agreed to the date range to be “from the date of the petition (June 20, 2016)
3 to the date of the agency final decision (August 8, 2017).” The Center’s email
4 further stated that we are seeking “documents about the decision not to list Pacific
5 bluefin tuna,” and that “we want correspondence related to the denial of the
6 petition,” but “do not want the rollout plan.” The email further stated that “[w]e
7 are not clear as to what a background document associated with the report would
8 be, but if it came after the decision not to list Pacific bluefin tuna (like a summary
9 fact sheet), then no, we do not want it.”

10 35. On March 19, 2018, NOAA sent the Center electronic mail stating
11 that the agency is reviewing records and expects to provide its “first interim
12 response by next week (March 27, 2018) with our final response completed no
13 later than September 20, 2018.”

14 36. On March 30, 2018, NOAA sent the Center a status update letter.
15 That letter stated that NOAA’s searches “will produce over 3,500 records,” and
16 that it is “in the process of producing approximately 3,000 records and anticipate
17 providing you with this material within the next 7 to 10 business days...We expect
18 to apply exemptions (b)(5), (b)(6), and possibly (b)(7) to some of the documents in
19 our final response. We will send you our final response no later than September 20,
20 2018, but we anticipate completion much sooner.”

21 37. On April 10, 2018, NOAA sent the Center its First Interim Response
22 Letter, which stated that it “located 3,226 records responsive to your request,”
23 granted the Center granted full access to those records, and provided an electronic
24 copy.

25 38. On April 24, 2018, NOAA sent the Center electronic mail stating that
26 it “provided [the Center] with an interim release of 3,226 records. We expect to
27 complete our final response within the next 30-60 days (significantly sooner than
28 our initial estimated completion date of 9/20/2018.)”

1 39. On June 18, 2018, NOAA sent the Center its Final Determination
2 Letter, which stated that the agency “identified an additional 458 documents that
3 are fully releasable and this material is being released to you in their entirety.”
4 That letter further stated that NOAA was “releasing 257 documents responsive to
5 your request that contain redactions under exemptions 5 U.S.C. 552(b)(5),” and
6 that Exemption 5 “exempts from disclosure inter-agency or intra-agency
7 memorandums or letters which would not be available by law to a party other than
8 an agency in litigation with the agency. The records are exempted from disclosure
9 under the deliberative process privilege, attorney client communication and/or
10 attorney work product.” NOAA’s letter went on to explain that the agency
11 withheld records under Exemptions 4, 6, and 7.

12 40. On July 27, 2018, the Center received an electronic mail with
13 NOAA’s Final Determination Letter dated June 18, 2018. On August 1, 2018, the
14 Center sent NOAA electronic mail stating that the Center “received this letter in
15 NOAA’s email on July 27, 2018. Please update the date on the letter and resend to
16 us for our records.”

17 41. On August 13, 2018, the Center sent electronic mail again asking for
18 an updated Final Determination Letter with corrected date.

19 42. To date, the Center has not received a response to neither its August 1,
20 2018, nor its August 13, 2018, emails seeking an updated Final Determination
21 Letter.

22 43. On September 11, 2018, the Center submitted an administrative
23 appeal to NOAA asserting that NOAA had improperly applied Exemption 5’s
24 attorney-client privilege to its withheld records, and had failed to conduct an
25 adequate search for all records.

26 44. Under FOIA, NOAA had 20-working days to make a decision on the
27 Center’s administrative appeal. 5 U.S.C. § 552(a)(6)(A)(ii). Thus, a decision was
28 due by October 9, 2018. NOAA has not yet issued this required decision.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

VIOLATION OF THE FREEDOM OF INFORMATION ACT

(Failure to Comply with FOIA's Mandatory Administrative Appeal Deadline)

45. The Center realleges and incorporates by reference all the allegations set forth in this Complaint, as if set forth fully below.

46. NOAA's failure to respond and make a decision on the Center's administrative appeal within the 20-working day deadline is a violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

47. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

48. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's administrative appeal deadline as it has in this case.

49. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF

VIOLATION OF THE FREEDOM OF INFORMATION ACT

(Failure to Conduct an Adequate Search for All Responsive Records)

50. The Center realleges and incorporates by reference all the allegations set forth in this Complaint, as if set forth fully below.

51. The Center has a statutory right to have NOAA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). NOAA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to the Center's FOIA Request.

1 52. Based on the nature of the Center's organizational activities, it will
2 undoubtedly continue to employ FOIA's provisions in record requests to NOAA in
3 the foreseeable future.

4 53. The Center's organizational activities will be adversely affected if
5 NOAA continues to violate FOIA's requirement to undertake a search that is
6 reasonably calculated to locate records that are responsive to the Center's FOIA
7 requests.

8 54. Unless enjoined and made subject to a declaration of the Center's
9 legal rights by this Court, NOAA will continue to violate the Center's rights to
10 receive public records under FOIA.

11 **THIRD CLAIM FOR RELIEF**

12 **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

13 **(Failure to Disclose All Responsive Records/Unlawful Exemptions)**

14 55. The Center realleges and incorporates by reference all the allegations
15 set forth in this Complaint, as if set forth fully below.

16 56. The Center has a statutory right to the records it seeks, and there is no
17 legal basis for NOAA to assert that any of FOIA's nine exemptions to mandatory
18 disclosure apply to withhold records from the Center. *See* 5 U.S.C. § 552(b)(1)-
19 (9).

20 57. NOAA has violated the Center's rights in this regard by withholding
21 records that are responsive to the Center's FOIA request.

22 58. Based on the nature of the Center's organizational activities, it will
23 undoubtedly continue to employ FOIA's provisions in FOIA requests to NOAA in
24 the foreseeable future.

25 59. The Center's organizational activities will be adversely affected if
26 NOAA continues to violate FOIA's disclosure provisions as it has in this case.

60. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF

VIOLATION OF THE FREEDOM OF INFORMATION ACT

(Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records)

61. The Center realleges and incorporates by reference all the allegations set forth in this Complaint, as if set forth fully below.

62. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

63. NOAA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's FOIA Request.

64. Based on the nature of the Center's organizational activities, it will continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

65. The Center's organizational activities will be adversely affected if NOAA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

66. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

RELIEF REQUESTED

For the foregoing reasons, the Center respectfully requests that the Court:

- 1 A. Declare that NOAA's failure to timely make a determination on the
- 2 Center's FOIA appeal is unlawful under FOIA, 5 U.S.C.
- 3 § 552(a)(6)(A)(ii).
- 4 B. Order NOAA to issue a decision on the Center's September 11, 2018,
- 5 administrative appeal by a date certain.
- 6 C. Declare that NOAA's failure to undertake a search for and disclose to
- 7 the Center all records that are responsive to the Center's FOIA request
- 8 is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i).
- 9 D. Order NOAA to conduct a search that is reasonably calculated to
- 10 locate all records responsive to the Center's FOIA request, with the
- 11 cut-off date for such searches being the date that the searches are
- 12 conducted, and to provide the Center, by date certain from the Court's
- 13 order, with all responsive records and reasonably segregable portions
- 14 of lawfully exempt records sought in this action.
- 15 E. Declare that NOAA's failure to properly apply FOIA exemptions, 5
- 16 U.S.C. § 552(b), is unlawful under FOIA.
- 17 F. Order NOAA to provide all records or portions of records that were
- 18 unlawfully withheld pursuant to FOIA Exemption 5 by date certain.
- 19 G. Award the Center its costs and reasonable attorney fees pursuant to
- 20 FOIA, 5 U.S.C. § 552(a)(4)(E), or 28 U.S.C. § 2412.
- 21 H. Maintain jurisdiction over this action until NOAA is in compliance
- 22 with FOIA and every order of this Court;
- 23 I. Grant the Center such other relief as the Court deems just and proper.

24 Respectfully submitted this 13th day of February, 2019.

25 /s/ Catherine Kilduff

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